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Supreme Court of the United States

October Term, 1936

BOURJOIS, INC.,
Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER and GEORGE H. COOMBS,
Appellees.

No. 534

BRIEF FOR APPELLEES

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RALPH W. FARRIS, *Assistant Attorney General.*
CLYDE R. CHAPMAN, *Former Attorney General.*
Counsel for Defendants-Appellees.

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STATEMENT OF CASE

The legislature of Maine at its regular biennial session in 1935, passed an Act entitled "An Act for the Regulation of Cosmetics" which said Act is contained in Chapter 109 of the Public Laws of Maine, 1935. (See Appellants brief p. 3.)

On December 10, 1935, the within named plaintiff a New York Corporation filed a Bill in Equity in the United States District Court of the District of Maine, seeking to enjoin the defendants who at that time were serving in their official capacities as Attorney General, Commissioner of Health and Welfare and Director of Public Health, from enforcing said Act, on the ground that the Act violated Secs. 8 and 10 of Art. 1 of the Constitution of the United States and also the Constitution of Maine.

An answer was filed by defendants denying the material allegations set forth in plaintiff's bill and the case came on for hearing before a statutory court composed of three judges under Section 380, Title 28 U. S. Code on January 3, 1936, at Portland, Maine, and the Court rendered its opinion February 19, 1936, denying temporary injunction, but giving plaintiff

leave to renew motion for a temporary injunction in case Interstate Commerce was in the future unduly interferred with, or due process of law denied the plaintiff by enforcement of any of the provisions of the Act, or regulations adopted thereunder.

On April 3, 1936, the plaintiff filed a supplemental bill of complaint renewing its motion for an injunction both preliminary and permanent, seeking again to enjoin the defendants from enforcing the Act. On April 15, 1936, the plaintiff filed interrogatories which were answered by the defendants May 13, 1936. (See R. pp. 30 and 36.)

On June 15th, the defendants filed supplemental answer, and the case again came on for hearing on the supplemental bill and answer on June 24, 1936, and the Court rendered its opinion denying the plaintiff's motion for an interlocutory and permanent injunction, dismissing the complaint with a single bill of costs.

Findings of Fact and Conclusions of Law were filed September 29, 1936. (See R. p. 54.)

An order denying interlocutory injunction and final decree was filed October 7, 1936; Petition for Appeal was filed October 15, 1936, together with assignment of Errors. (R. pp. 60 and 62.) and Order Allowing Appeal was filed October 20, 1936, and the case now comes before this Honorable Court for argument.

Analysis of the Statute

1. The statute in question does not attempt to compel plaintiff to pay the costs of administering the State law. In other words the statute does not affect the plaintiff in this case for the reason the plaintiff is not engaged in intra-state commerce in the State of Maine.

2. The State under its police power has a right to enact legislation to safeguard the public health by requiring local dealers in the State of Maine to register and secure certificate of same before selling cosmetics to the citizens of Maine, and the Department is authorized under the statute to refuse a certificate of registration or prohibit the sale of cosmetic preparation which in its judgment contains injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. (See Sec. 2 of the Act.)

The appellant argues the statue is unconstitutional because no attempt has been made to allocate the expense of enforcing the statute from the expense of administering other statutes of the state. In answer to interrogatory No. 27, the defendants state, "A separate account has been set up in the State Treasurer's Department to which all cosmetic fees are credited, which are to be expended by the department entirely for the enforcement of Chapter 109 of the Public Laws of 1935." (R. p. 39.)

3. The Statute does not attempt to exact a registration fee from foreign corporations engaged in an interstate commerce business with local dealers in the State of Maine.

4. The Statute delegates only reasonable powers to the Department of Health and Welfare to promulgate rules and regulations to carry out the purpose of the act to safeguard the public health. In case of refusal of said department to issue a certificate of registration for any cosmetic preparation

appeal shall lie to the Superior Court in any county in the State, and the renewal of a certificate is equivalent ipso jure to the issuance of an original certificate.

5. Section 1 provides for the registration of cosmetics with the Department of Health and Welfare. Section 2 authorizes the Department of Health and Welfare to issue certificates of registration, affix the fees, etc., and provides for appeal in case of refusal to issue certificate of registration for any cosmetic preparation. Section 3 defines cosmetic preparations, and Section 4 validates permits issued under the Public Laws of 1933. Section 5 provides for cosmetic preparations kept or deposited for unlawful sale or use in this state and the forfeiture thereof, and gives the sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the Department of Health and Welfare power to seize the same. Section 6 prescribes the duties of the officers of the Department of Health and Welfare in regard to cosmetic preparations which are seized by the officers or duly authorized agents of the department. Section 7 provides a forfeiture in case no claimant appears. Section 8 provides that if any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act. Section 9 provides for exceptions of preparations purchased prior to the effective date of this act. Section 10 prescribes the penalty for violation of any provisions of the act or regulations made thereunder, and Section 11 provides for repeal of Chapter 278 of the Public Laws of 1933.

The purpose of the act is manifest. It was an act passed for the purpose of protecting the health and safety of the people of the State of Maine, and as such was a valid exercise of the police power of the State.

Summary of Argument

1. The statute is not unconstitutional as a regulation or burden on interstate commerce.

2. The statute does not delegate legislative functions.

3. The statute is not unconstitutional by reason of the due process clause of the Federal Constitution.

4. The statute is not unconstitutional in that the fees may be devoted to purposes other than inspection of cosmetics because the act provides fees shall be used to carry out the purposes of the act, and will not be used for the inspection of interstate shipments.

5. Valuable property rights are not destroyed by ex parte orders of the Department of Health and Welfare as the act provides for appeal and also for a penalty for violation of any provisions of the act or any regulation made by the department.

6. The penalty as fixed by the statute is not excessive and does not prevent complainant from testing constitutionality of act.

7. The Legislature in the exercise of the police power may regulate, restrain and prohibit whatever is injurious to the public health and morals.

ARGUMENT

Defense of Statute

Section 1 applies only to those persons, firms or corporations doing business in intra-state commerce and does not apply to the plaintiff a foreign corporation doing an interstate commerce business. The act is not limited to beauty shops, barber shops or similar establishments. It applies to all persons, firms or corporations who sell or offer for sale in Maine unregistered cosmetics in intra-state commerce (Sec. 1 of Act.) A separate account of the cost of enforcement of the act and the receipts from registration fees are kept in the State Treasurer's Office. (See Ans. to Int. No. 27, R. p. 39.)

The statute defines "cosmetic preparations" in Sec. 3 of the Act, and the only requirement of the statute is that dealers or manufacturers doing an intra-state commerce business in the State of Maine in cosmetics shall secure a certificate of registration from the Department of Health and Welfare which is issued to said dealers after an analysis of the cosmetic preparation and which in its judgment contains no injurious substances in such amounts as to be poisonous, injurious or detrimental to the person.

It is admitted by the plaintiff's expert witness, Dr. J. Harper Blaisdell, that there are a certain number of cosmetics which are injurious to the health of the general public. (R. p. 156 and 164.)

"Fees received under the provisions of the act shall be used by said department for carrying out the purpose of this act." (Sec. 2 of Act.)

The act became effective on January 1, 1936, and the state officials, who are defendants and appellees in this case, notified local dealers in cosmetics that it was their intent to enforce same, but it has never required any firm, person or corporation

doing business outside the State of Maine to register its cosmetic preparation.

The appellant contends that the act violates Section 10 of Article 1, and also the fourteenth amendment of the Federal Constitution in that it imposes a burden on interstate commerce and deprives it of property rights without due process of law, however, statutory requirements are expressly limited by the act of intra-state commerce and the appellees submit that the provisions of the act and the rules thereunder in no way affect the plaintiff-appellant, and there is no evidence in the record that it has or ever will affect its rights.

The plaintiff-appellant further contends that the requirements affect every out of state manufacturer or producer of cosmetic preparations who sells cosmetic preparations to retailers in the State of Maine, and requires that they shall register each preparation and pay an initial registration fee of fifty (50) cents for each preparation and places a burden on interstate commerce. It is admitted by appellant that it ships its products into other states in the original packages consisting of a large carton in which is contained small articles of cosmetic preparations. (R. p. 88.) There is no evidence that the department has ever attempted to touch the original shipping package, however, there is evidence that the department does not intend to interfere with interstate commerce. (Testimony of Dr. Campbell R. p. 170.)

The appellees contend that the original package is the shipping container in which the cosmetic preparations are shipped into the state, and when they are removed therefrom and placed on the shelves or counters of the local dealers in Maine, they become mingled with the mass of property in the State and are no longer in interstate commerce and if unregistered in accordance with Section 2 of the Act, are subject to seizure and forfeiture.

This principle is borne out by the decisions. The law relating to original packages was first considered in Brown vs. Maryland, 12 Wheat. 419, in which the State of Maryland required all importers of intoxicating liquors by wholesale hogshead, barrel or tierce to take out a license which the Supreme Court held was repugnant to that provision of the Constitution forbidding a levying of a duty on imports as well as that declaring that Congress should have the power to regulate commerce with foreign nations.

In May vs. New Orleans, 178 U. S. 496, the Court said:

> "In our judgment the original package * * * * was the box or case in which the goods imported were shipped, and when the box was opened for sale or delivery of the separate parcels contained in it, each parcel lost its distinctive character as an import and became property subject to taxation by the State as other like proparty situated within its limits."

The principles laid down in Austin v. Tennessee, 179 U. S. 343, are decisive of the case here. The Court said, page 359:

> "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original' package in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to

> the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article."

Again, the Court said on page 360 of the above case:

> "This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of the sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

While the court's conclusion in this case was grounded on the opportunity for fraud upon the health laws of a state, the opportunity is just as great in connection with cosmetic preparations, if the contention of the appellant is sustained in this case.

The principles laid down in Austin v. Tennessee were adhered to in Cook v. Marshall County, 196 U. S. 261, 269, 270, and cited with approval in Kirmeyer v. State of Kansas, 236 U. S. 568, 573; McDermott v. State of Wisconsin, 228 U. S. 116, 135; Hebe Co. v. Shaw, 248 U. S. 297, 304.

In Cleveland Macaroni Co. v. State Board of Health, 256 Fed. 376, in which the plaintiff's contention was the same as

that of the appellant here, viz; that the goods put up in separate packages were shipped in large shipping cases and taken out by the retailer and sold in the original packages in which they were put up, or the retailer removed them from the cases in which they were shipped and placed them on the shelves for sale to the consumer, the Court said:

> "Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the State,"

citing Austin v. Tennessee, supra. The Court further said:

> "It appears from the defendant's return on the order to show cause that the plaintiff's goods were shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers."

In McDermott v. State of Wisconsin, supra, the Court said:

> "And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted,"

citing the cases of Austin v. Tennessee, and Cook v. Marshall County, supra.

Some of the state cases in which the doctrine of the above cases have been applied are: Commonwealth v. Schollenberger, 156 Penn. St. 201; Haley v. Nebraska, 42, Nebr. 556; McGregor v. Cone, 104, Iowa, 465, 471, 473; State v. Winters, 44 Kan. Sup. 723.

In Commonwealth v. Schollenberger, supra, the Court in defining an original package, said:

> It is "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."

The exhibits introduced in evidence cannot be said to comply with this definition. (R. pp. 88 and 89). Also see United States v. One Hundred and Thirty-two Packages, 76 Fed. 364, 368; Vol. 2 Bouvier's Law Dictionary under Title, "Original Packages." (See R. pp. 48, 49 and 50.)

The statute is not unconstitutional as a regulation or burden on interstate commerce.

It is a well settled principle in interpretation of statutes that they are presumed to be constitutional unless repugnancy to the Constitution clearly appears.

> Buttfield vs. Stranahan, 192 U. S. 492
> Nicol vs. Ames, 173 U. S. 509, 514, 515
> Gettysburg Park Case, 160 U. S. 668, 680.

Safeguarding the public health and safety is valid exercise of police power of state.

The evident purpose of the statute requiring cosmetics to be registered is to prevent the sale of cosmetics which would be injurious to the health of the people of the State of Maine. Its requirements are directed to that and are reasonable.

> "But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. . ."
>
> *Savage vs. Jones* 225 *U. S.* 501, 525.

In that case, statute related to sale of food for domestic animals and required filing of statements and certificates, affixing labels, etc., bearing certain information as to ingredients, etc. This statute was upheld as a valid exercise of the police power of the state.

In *Fourgera & Co. vs. New York*, 224 *N. Y.* 269, 120 *N. E.* 642, the complainant sought to enjoin enforcement of certain sections of the Sanitary Code adopted by the Board of Health of the City of New York. These sections provided that patent or proprietary medicines should not be sold in New York unless "the names of the ingredients of every such medicine to which the therapeutic effects claimed are attributed, and the names of all other ingredients, except such as are physiologically inactive, shall be registered in the department of health." The code also provided for the registration of other information. The Court in that case said:

> "The argument is made that the ordinance is an arbitrary exercise of the power of government. We do not think so. Its purpose and effect are well within the limits of the police power. The purpose is the preservation of the public health and safety - - - -
>
> " 'No man has a constitutional right to keep secret the composition of substances which he sells to the public as articles of food.' State v. Aslesen, supra. If that is true of food, it is even more plainly true of drugs. A danger exists, and the only question is whether the means of correction are appropriate. We cannot say that the means have no relation to the end. The public health is safeguarded by disclosure to public officers charged by law with its protection. We are not called upon to approve the wisdom of the ordinance. We stop when we satisfy ourselves that it has a reasonable relation to the end to be obtained."
>
> "Other objections are based upon a supposed conflict between the ordinance and the Federal Constitution. It is said that, if applied to transactions of interstate or foreign commerce, the act is an infringement of the exclusive

> power of Congress. We think this objection is answered by Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. The ordinance is an exercise of the police power of the state for the protection of the lives of its inhabitants . . . . . (cites cases) . . . . Such legislation may be permitted, though it affect incidentally interstate or foreign commerce, until Congress has disclosed a purpose to supersede the police power of the states, and take exclusive possession of the field . . . . . ."

In *Patapasco Guano Co. v. North Carolina;* 171 *U. S.* 345, 357. the Court upheld the statute, saying:

> "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self protection commonly called the police power – – – where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope – – – The Act of January 21, 1891, must be regarded, then, as an Act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of twenty-five cents per ton is intended merely to defray the costs of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the Act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of

state inspection laws, and allows the collection of the amounts necessary for their execution, and we think the same principle must apply to interstate commerce. In my view, the effect on that that commerce is indirect and incidental and 'the Constitution of the United States does not secure to any one the privilege of defrauding the public.' "

See also—Plumley v. Massachusetts, 155 U. S. 461.

McLean v. Denver & Rio Grande R. R. Co. 203 U. S. 38, 50. Crescent Mfg. Company vs. Wilson 233 N. Y. 282.

The statute does not delegate legislative functions.

The statute (Section 2) provides that:

"The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50c per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50c . . . . ."

It is clear from a consideration of the statute as a whole that it was intended to prevent the sale of cosmetics containing substances in such amounts as to be poisonous, injurious or detrimental to the citizens of the State of Maine. The appellant argues that because the Legislature did not provide rules, regulations, ordinances or by-laws of any kind it amounts to a delegation of legislative duties.

The authorities on the question of Delegation of Powers are collected in *Union Bridge Co.* v. *United States* 204 *U. S.* 364, 377 *et seq.* In that case, the Court upheld an Act of Congress providing that navigation be freed from unreasonable obstructions arising from bridges which are of insufficient height or

width of span, or are otherwise defective and imposing the duty upon an executive officer of ascertaining what particular cases come within the prescribed rule. This was held not to be a violation of the Constitutional prohibition against delegation of legislative or judicial power.

In *Buttfield v. Stranahan*, 192 *U. S.* 470, 496, the Court said:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Tresaury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of the opinion that the statute, when properly construed as said by the Circuit Court of Appeals, but expressed the purpose to exclude the lowest grade of teas, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard; and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the state . . . . Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case compelled to leave to executive officials the duty of bringing about the result pointed out by the statute . . . "

St. Louis & Iron Mountain Ry. V. Taylor, 210 *U. S.* 281, 287.

"It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with bars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon the question except that it was settled adversely to the contention of the plaintiff in error in Buttfield v. Stranahan, 192 U. S. 270, a case which in principle is completely in point. And see Union Bridge Co. v. U. S. 204 U. S. 364, where the cases were reviewed."

Red "C" Oil Co. vs. North Carolina, 222 *U. S.* 380, 394.

> "The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable . . . "

The Legislature in the case at bar has merely conferred on the Department of Health and Welfare authority or discretion as to the law's execution which is to be exercised in pursuance of the obvious intention of the act. There is no delegation of the legislative powers involved in this case.

The Legislature went as far as was reasonably practicable. To have gone farther would have required a knowledge which the Legislature could not be expected to possess. The knowledge of ingredients, the chemical analysis thereof, and the methods of detecting injurious substances, etc., require a special knowledge which is within the specialized field of the Department of Health and Welfare.

It is argued by the complainant that the Department of Health and Welfare could make unreasonable and arbitrary regulations, which would not be subject to review. The defendants respectfully contend that the act does not enable the Department of Health and Welfare to make unreasonable or arbitrary regulations. If appellant sought to register a harmless preparation and registration was refused, it has its remedy by an appeal to the Superior Court where a trial by jury can be had upon questions of fact. The act is directed against harmful, injurious and poisonous cosmetics and it cannot be fairly argued that the Department of Health and Welfare can arbitrarily decline to register harmless or non-poisonous cosmetics, or make regulations discriminating against one manufacturer or another doing an intra-state business in Maine.

The statute is not unconstitutional by reasons of the due process clause of the Federal Constitution.

The appellant contends that the statute is unconstitutional because it does not exempt harmless merchandise such as perfumes.

The statute in question was approved April 1, 1935, and by its own provisions was to become effective January 1, 1936, and Section 9 of the act provides as follows:

> "Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating."

After the passage of the act, the plaintiff had over nine months in which to adjust its cosmetic preparations so that they could be registered by the local dealers in Maine, and not contain injurious or harmful ingredients before the act became effective. The provisions of the act were prospective and not retroactive.

On this state of facts the plaintiff is not deprived of its property without due process of law. The case at bar, on this point, does not come within the case of Fourgera & Co. v. New York, 224, N. Y. 269, 120 N. E. 642, cited by appellant. In that case the act was apparently passed to become effective immediately.

The statute in the case at bar does not forbid the sale of harmless merchandise; it merely provides for registration of cosmetics in order that the sale of harmful cosmetics may be prevented.

The statute is not unconstitutional in that the fees may be devoted to purposes other than inspection of cosmetics.

The appellant argues that the statute is unconstitutional even if it is an inspection statute because the fees are not limited to the actual costs of inspection of intra-state business. There is no evidence in this case to show that the fees received from registration of cosmetics have been used for purposes other than the inspection of cosmetics in intra-state commerce. There is no evidence to show that the charge is unreasonable or that it was more than it would cost to inspect and register the cosmetics. True, the appellant cites authority that an act was unconstitutional in another state because it did not segregate the expense of inspecting intra-state shipments from the expense of inspecting interstate shipments. There is evidence in the record that this inspection law will not be applied to interstate shipments. Doctor Campbell testified (R. p. 170) that the department would not make inspection of interstate shipments. (Interrogatories R. pp. 30 and 41.) In the absence of evidence showing that the fees are unreasonable and that they will be used for inspection of interstate shipments the statute should not be declared unconstitutional.

Valuable property rights are not destroyed by ex parte orders of Department of Health and Welfare.

The appellant contends that the statute is unconstitutional because it does not give the manufacturer the right of notice, open hearing, and the right to present testimony, to cross-examine and fair opportunity to comply with rulings.

The right of a local manufacturer or dealer to continue selling his preparation is a valuable property right which cannot be

destroyed by an ex parte order of an executive body whose determination cannot be reviewed. In the case at bar the ruling of the department can be reviewed by the Superior Court of the State of Maine.

The statute provides that:

> "From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state for which the same was offered for registration."

And Section 10 of the act further provides as follows:

> "Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-law, or regulation made thereunder, shall be punished by a fine of not more than $100. . . . . ."

This does not invoke the above proposition as declared by appellant. The statute provides for registration, and declares the penalty for non-compliance. The fines and penalties are not levied by the Department of Health and Welfare but are expressly specified in the Act.

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the Details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."
>
> "In Union Bridge Co. v. United States, 204 U. S. 364; In re Kallock, 165 U. S. 326; Buttfield v. Stranahan, 192 U. S. 470, it appeared from the statutes involved that

> Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. By confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."

United States v. Grimond, 220 *U. S.* 506, 517, 518.

If appellant applies for registration and is refused, it has a remedy. If it is prosecuted for a violation of the act, the court will determine the facts and if found guilty, a penalty as established by the act up to $100.00 could be imposed. The Department of Health and Welfare is not authorized, nor does it attempt, to issue orders whereby anyone affected is not given a right to a hearing.

This is a different case than those cited by appellant where the executive body levied the fines and penalties or where the executive body attempted to enforce regulations not authorized by the statute.

Appellants' valuable property rights are not subject to destruction by ex parte orders of an executive body.

The penalty as fixed by the statute is not excessive and does not prevent appellant from testing constitutionality of act.

The statute in question provides a penalty or a fine of not more than $100.00. It applies to any person, firm or corporation that violates any provision of the act and is not confined to the proprietors of a beauty shop, barber shop, hairdressing establishment or similar establishment. It is an attempt on the part of the Legislature in the exercise of its police power to make laws for the protection of the public health.

The Legislature having enacted such laws in general terms, may confer on a board of health the duty of enforcing them, and to that end may give it authority to make reasonable rules and regulations which shall have the effect of law. (A. L. R. 54-1114.) The board may not in itself provide a penalty for the violation of its regulations, but it is competent for the Legislature to prescribe a penalty for the violation of rules or regulations thereafter made by the board.

In the case at bar the Legislature prescribed the penalty set forth in the act. This penalty is not too grossly excessive as to constitute a deprivation of property without due process of law, nor is the penalty of so extreme a character as probably to prevent resort to the courts to test statute's validity.

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties, and is therefore unconstitutional on that ground, within the ruling in Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, is not justified."

Rast v. Van Devan & L. Co. 240 *U. S.* 342.

That case involved penalties of $1,000 fine or six months imprisonment for violations of a statute against the sale without payment of a specified license fee, of merchandise accompanied by coupons, etc.

> "As to the objection because of the penalties, this is not a suit to enforce penalties; nor in view of the provisions of the statute can we say that the penalties are as great as to prevent a resort to the courts to ascertain the constitutionality of the law. . . . ."

Rail Coal Co. v. Ohio Industrial Comm. 236 *U. S.* 338, 350.

In that case statute provided:

> "Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than $300 nor more than $600."

The Legislature in the exercise of the police power may regulate, restrain and prohibit whatever is injurious to the public health and morals.

Admitting that the subject to which the statute relates is within the scope of legislative power, the test of validity within the police power is whether or not the regulations prescribed are reasonable; and the test of reasonableness is whether the attempted regulation makes efficient constitutional guaranties and conserves rights, or is destructive of inherent rights.

If the regulations prescribed are reasonable, they are valid, but if they are unreasonable, they are void, as the taking of private property without compensation and without due process of law. In applying this test it must be remembered the presumption is in favor of the reasonableness and validity of the law.

Powers v. Pennsylvania, 127 *U. S.* 678.

It is the duty of the courts to enforce the state's police regulations enacted by the Legislature in good faith and with reasonable and appropriate regard for the protection which the state owes the life, health and property of her citizens.

The Legislature is the sole judge as to all matter pertaining to the policy, wisdom, and expediency of statutes enacted under the police power.

State v. Legendre, 138 *La.* 154, 70 *S.* 70
Erie Railway Co. vs. Williams, 233 *U. S.* 685.

On the other hand, whether the legislation purporting to be enacted in the exercise of the police power is rightly such, and whether regulations prescribed by the Legislature are unreasonable or are otherwise unconstitutional, are questions for the judiciary.

McLean vs. Arkansas, 221 *U. S.* 539
California Reduction Co. v. Sanitary Reduction Works, 127 *Fed.* 29.

It was admitted by Doctor Blaisdell, appellant's expert witness (R. pp. 156 and 157) that there were injurious ingredients in some cosmetics, that all cosmetics are different so far as the ingredients are concerned; and the defendants argue that it was the intent of the Legislature in the enactment of the Cosmetic Law to prohibit the sale of cosmetic preparations which contained injurious or poisonous substances. In other words it is a protective measure for the people of Maine, and upon a reasonable construction of the act there is some substantial reason why such legislation will promote the public health.

The appellees respectfully contend that the statute should be sustained as a reasonable exercise of the police power of the state, and that the court should take the view that the enactment has for its object the preservation of the public health and the general welfare of the citizens of the State of Maine.

> "Language of the Constitution is generally extended to include new things and new conditions of same class as those specified which were not known or contemplated on adoption."

Glaser v. Buck, 179 *N. E.* 1 (*Ind.*).

"Burden is upon those alleging unconstitutionality of legislative act to show clearly and palpably wherein it violates Constitution."

Bowes v. Glas. 179 *N. E.* 80 (*Ill.*).

"Milk Control Act disclosing legislative policy and specifically directing milk control board to take measures requisite for elimination of destructive trade practices and ruinous competition and to consider, in fixation of prices, the grade quality of milk and other conditions affecting costs of production, transportation and marketing to permit reasonable return to the producers of milk dealers HELD not unconstitutional as delegating legislative powers to the board."

State Board of Milk Control v. Newark Milk Co. 179 *A.* 116 (N. J.).

"Courts are loath to overthrow acts of Legislature in exercise of its police power if Legislature acts reasonably."

Moritz v. United Brethrens Church 269 *N. Y.* 125-199 *N. E.* 29.

Suffolk County v. Water Power and Control Commission 199 *N. E.* 41, 269 *N. Y.* 158.

The Act is not repugnant to Section 10, Clause 2, of Art. I, of the Constitution of the United States of America.

The appellant argues on Page 32 of its brief that the state does not have the constitutional power to exact a registration fee as a condition precedent to the sale of merchandise within the state. The appellees submit that the levying of a local tax upon imports comes within the constitutional inhibition, but there must be some point of time when imports lose their

character as such and cease to possess rights superior to the general mass of property in the country. In the present case the registration fee is not applied by the state officials until the goods are in the hands of local dealers for sale in intrastate commerce, and the act in no way affects the plaintiff-appellant or violates Article I of the Constitution of the United States of America. Chief Justice Marshall in the leading case of Brown vs. Maryland, Supra., discussed with characteristic fullness, clearness and power, the principles underlying this question, and blazed a path from which the courts have not strayed for the past one hundred and ten years. When goods are imported into the United States from a foreign country for sale and use here, there must be some point of time at which they lose their character as an import. What that point is, depends upon the peculiar facts of each particular case, and the manner in which the importer deals with the imported goods.

In the case at bar the plaintiff-appellant has no control of the cosmetics after they are in the hands of the retail dealers in Maine, and there broken down and each article placed on sale in the local stores, nor does the Maine act apply to those cosmetic preparations until they are out of interstate commerce. It is true that the effect of the original package cases have been obviated to a certain extent by the Act of Congress known as the Wilson Act, and the Webb-Kenyon Act, but these acts apply to intoxicating liquors. The Wilson Act has been sustained by this court as a constitutional exercise by Congress of its power to regulate interstate commerce. The Webb-Kenyon Act goes a step further than the Wilson Act and makes the fact that intoxicating liquors are in original packages no bar to the action of a state in forbidding their importation into prohibition territory. The Wilson Act only modified existing rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than

they otherwise would, that is, after delivery but before sale in the original packages. The term original package has been defined in somewhat different language, but for the most part with a single inherent meaning. A comprehensive and satisfactory definition is this:

> "An original package, as applied to interstate and international commerce, is a package, bundle or aggregation of goods, put up in whatever form, covering or receptacle, for transportation, and as a unit transported from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment in which it was shipped." (12 C. J. Page 31.)

Findings of the Statutory Court under Section 380 of Title 28, of the United States Code.

After stating many of the facts the Honorable Court below disposed of the federal questions, as follows:

> "23. Since the manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients, the Department of Health and Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health of the person using such preparations. Evidence introduced before the Court disclosed that certain cosmetic preparations have proven injurious to the users of the same.
>
> 24. No evidence has been submitted on behalf of plaintiff clearly showing that the fees fixed by said Chapter 109 are excessive." (R. p. 58.)

Conclusions of Law by the Court.

> "2. The original packages in which plaintiff has shipped its cosmetic preparations to the State of Maine, have been and are the shipping containers in which the cosmetic

preparations have been shipped into the State, and when the cosmetic preparations, put up in individual bottles or packages, are removed from said shipping containers and placed on its shelves or counters or in the storerooms of the retailer to be sold directly to the ultimate consumer, said cosmetic preparations were and are no longer in interstate commerce, and if unregistered in accordance with Section 2 of said Chapter 109, said cosmetic preparations were and are subject to seizure and forfeiture, as provided in said Chapter 109.

5. Said Chapter 109 is not in violation of the Constitution of the State of Maine or of the United States." (R. pp. 58 and 59.)

Articles 9 and 10 of the amendments to the Constitution of the United States provide that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, and the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people, and the appellees submit that the State of Maine under its police power, and the provisions of the Constitution of the United States and the State of Maine, has the right to enact Legislation to protect the health and promote the general welfare of the people of the State of Maine.

The burden of proof was on the plaintiff-appellant to sustain the allegations set forth in its two Bills in Equity in the United States District Court of Maine, and the appellees submit that the plaintiff-appellant failed to produce sufficient evidence to entitle it to an injunction, and for this reason the appellees pray that the judgment and decree of the statutory court below be sustained.

Respectfully submitted,

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